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In the Supreme Court of the United States

October Term, 1935.

No. 599

EDWARD A. LEAHY,

Petitioner,

vs.

STATE TREASURER OF OKLAHOMA, RAY O. WEEMS, as STATE TREASURER, OKLAHOMA TAX COMMISSION, MELVEN CORNISH, W. D. HUMPHREY, and JOHN T. BAILEY, as Members of the OKLAHOMA TAX COMMISSION,

Respondents.

Brief of Respondents

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PRELIMINARY STATEMENT

The petitioner is a member of the Osage Tribe of Indians, to whom a Certificate of Competency was issued by the Secretary of the Interior on the 24th day of May, 1934.

During the year 1932, he received as a member of such tribe, a certain amount as his pro rata share of the funds derived from the sale of minerals belonging to the tribe. On this income, the State of Oklahoma levied an income tax. The Supreme Court of the State sustained the tax: *Leahy* v. *State Treasurer of Oklahoma, et al.*, 49 Pac. (2d) 570.

ARGUMENT

It is the contention of the petitioner that the income herein involved is immune from State taxation for the reason that the mineral rights are reserved to the tribe under the Osage Allotment Act of June 28, 1906.

It is admitted by the pleadings that petitioner was issued a certificate of competency by the Secretary of the Interior on the 24th day of May, 1924, and that he held such certificate at the time he received the income in question. This certificate was issued to him under the authority of the Act of Congress of June 28, 1906 (34 *Stats. at L.* 539), which provides:

> "The Secretary of the Interior, in his discretion, at the request and upon the petition of any adult member of the tribe, may issue to such member a certificate of competency, authorizing him to sell and convey any of the lands deeded to him by reason of this Act, except his homestead, which shall remain inalienable and non-taxable for a period of twenty-five years, or during the life of the homestead allottee, if upon investigation, consideration, and examination of the request he shall find any such member fully competent and capable of transacting his or her own business and caring for his or her own individual affairs; provided, that upon the issuance of such certificate of competency the lands of such member (except his or her homestead) shall become subject to taxation, and such member, except as herein provided, shall have the right to manage, control, and dispose of his or her lands the same as any citizen of the United States; provided, that the surplus lands shall be non-taxable for the period of three years from the approval of this Act, except where certificates of competency are issued or in case of the death of the allottee, unless otherwise

provided by Congress; and provided further, that nothing herein shall authorize the sale of the oil, gas, coal or other minerals covered by said lands, said minerals being reserved for the use of the tribe for a period of twenty-five years, and the royalty to be paid to said tribe as hereinafter provided: and provided further, that the oil, gas, coal and other minerals upon said allotted lands shall become the property of the individual owner of said land at the expiration of said twenty-five years, unless otherwise provided for by Act of Congress."

It is our contention that the issuance of this certificate was in effect a removal of restrictions on the land of petitioner except as to the sale of his homestead and headright, and was a removal of restrictions upon him as to the fund herein involved, and that petitioner after receiving such certificate was entitled to receive his pro rata share of the trust fund belonging to the tribe free from all restrictions and control by the Federal government.

It was the duty of the Secretary of the Interior to pay such funds to him in quarterly payments under Section 4 of the Act of Congress of March 3, 1921, 41 *Stats. at L.* 1250, which provides:

"That from and after the passage of this Act the Secretary of the Interior shall cause to be paid at the end of each fiscal quarter to each adult member of the Osage Tribe having a certificate of competency his or her pro rata share, either as a member of the tribe or heir of a deceased member, of the interest on trust funds, the bonus received from the sale of leases, and the royalties received during the previous fiscal quarter, and so long as the income is sufficient to pay to the adult members of said tribe not having a certificate of competency

> $1,000 quarterly except where incompetent adult members have legal guardians, in which case the income of such incompetents shall be paid to their legal guardians, and to pay for maintenance and education to the parents or natural guardians or legal guardians actually having minor members under twenty-one years of age personally in charge $500 quarterly out of the income of said minors all of said quarterly payments to legal guardians and adults, not having certificates of competency to be paid under the supervision of the superintendent of the Osage Agency, and to invest the remainder after paying all the taxes to such members either in United States bonds or in Oklahoma State, county, or school bonds, or place the same on time deposits at interest in banks in the State of Oklahoma for the benefit of each individual member under such rules and regulations as the Secretary of the Interior may prescribe: Provided, That at the beginning of each fiscal year there shall first be reserved and set aside out of the Osage tribal funds available for that purpose a sufficient amount of money for the expenditures authorized by Congress out of the Osage funds for that fiscal year: Provided Further, That all just existing individual obligations of adults not having certificates of competency outstanding upon the passage of this Act, when approved by the Superintendent of the Osage Agency, shall be paid out of the money of such individual as the same may be placed to his credit in addition to the quarterly allowance provided for herein."

Upon the passage of the Acts above referred to, petitioner was completely and fully emancipated as to this fund. The quarterly payments provided for by the Act were not paid to him as a ward of the government but were paid to him as a matter of right. The Federal government had no discretion in the matter. It could not

withhold such payments nor could it control the manner in which such fund was used or invested by him. It was, therefore, subject to State taxation. In this view we are supported by the case of *Chouteau* v. *Burnet,* (C. C. A. 10), 38 Fed. (2d) 976. In the last paragraph of the headnotes, the gist of the decision is stated as follows:

> "Where taxpayer was member of Osage Tribe and tribal lands were allotted to him under Osage Allotment Act, June 28, 1906 (34 Stat. 539), and his gross income for years in question was his pro rata share from tribal mineral leases given with approval of secretary under statute, and in addition to his own allotments he was owner by inheritance of land allotted to another member of tribe, and he had applied for and received certificate of competency provided for by Act of June 28, 1906, Sec. 2, par. 7 (34 Stat. 542), he was liable for income tax under Revenue Act 1918 (40 Stat. 1057), and Revenue Act 1921 (42 Stat. 227), since certificate of competency bestowed upon him unrestricted management of his affairs and gave him full power to use and dispose of his property according to his own judgment."

In the discussion of the case after citing the Acts of Congress hereinabove referred to, the court said:

> "Apparently the purpose of the statute in authorizing the certificate and its subsequent issuance was to fully emancipate the Indian receiving it from further Governmental control and supervision of his property, except his homestead. Chouteau's gross income for the three years was wholly his pro-rata share of royalties and bonuses on the mineral produced for those years. His certificate of competency bestowed upon him unrestricted management of his affairs and gave him full power to use and dispose of his property according to his own judgment.

> Thereafter his pro-rata share in the mineral production was paid to him not as a ward of the Government. It was paid to him under the terms of the Act, but was not a Governmental instrumentality and means to gradually bring him to a state of competency and independence. By provision of the Act it was determined that he was competent to have exclusive management of his own affairs when the certificate was issued to him. He obtained it at his request and with the Government's consent and approval, and thereupon he assumed the same burdens that the law imposes on every other individual property owner. We think his civil status thus fixed brought him within the terms of the income tax statutes. As to him the ruling of the Board of Tax Appeals is therefore affirmed."

This case was on appeal affirmed by the Supreme Court of the United States, *Choutcau* v. *Burnet*, 283 U. S. 691. It is there said:

> "The petitioner, then, was competent to hold and make any use (except to grant mining leases) of all his lands. All except his homestead were taxable, and were freely alienable without control or supervision of the government. His share of the royalty from oil and gas leases was payable to him, without restriction upon his use of the funds so paid. It is evident that as respects his property other than his homestead his status is not different from that of any citizen of the United States. In the process of gradually changing the relation between the Indian and the government he has been, with respect to the income in question, fully emancipated. (Compare United States v. Waller, supra). It is true, as petitioner asserts, that as to his homestead he still remains a restricted Indian. But this fact is only significant as evidencing the contrast between his qualified power of disposition of that property and his

> untrammeled ownership of the income in controversy. The latter was clearly beyond the control of the United States. The duty to pay it into petitioner's hands, and his power to use it after it was so paid, were absolute. Work v. Mosier, 261 U. S. 352; Work v. Lynn, 266 U. S. 161. The claim that with respect to this income the petitioner was restricted, and therefore exempt from the tax laid by Sections 210 and 211 (a) must fail."

Petitioner contends that this case is not controlling for the reason that the question there involved was the right of the Federal government to levy and collect a Federal income tax on the income derived from the mineral resources of the tribe, that the Federal government had a right to levy such tax because it has the right and power to tax its own agency or instrumentality if it chooses so to do, but that the State cannot do so unless granted that right by Congress. We think petitioner misconstrues the effect of the holding in that case. The right to levy and collect the tax was not sustained on the theory that it was a tax by the Federal government upon its own instrumentality, and that the Government had a right to levy such tax, but was sustained on the theory that the certificate of competency issued to the Indian in that case had the effect to completely emancipate him as to trust funds received by him under the Act, and that such fund was for that reason subject to the tax. The court in that case speaking of the status of an Osage Indian who had received a certificate of competency said:

> "His share of the royalties from oil and gas leases was payable to him without restriction upon his use of the funds so paid. It is evident that as respect to his property other than his homestead, his

status is no different from that of any citizen of the United States. * * *

It is further insisted that since the royalties are not taxable, so long as they remain in the hands of the government in trust for the tribe and undistributed to members, income derived by the individual member from this fund comes from an exempt source and must therefore also be held to be exempt. (See Pollock v. Farmers' Loan & Trust Co., 157 U. S. 429; 158 U. S. 601.) Royalties received by the government from mineral leases of Indian lands have been held to be beyond a State's taxing power (Gillespie v. Oklahoma, 257 U. S. 501; Shaw v. Oil Corp., 276 U. S. 575) on the ground that, while in the possession of the United States they are a federal instrumentality, to be used to carry out a governmental purpose. It does not follow, however, that they cannot be subjected to a federal tax. The intent to exclude must be definitely expressed, where, as here, the general language of the Act laying the tax is broad enough to include the subject matter. Heiner v. Colonial Trust Co., 275 U. S. 232; Shaw v. Oil Corp., supra. But whatever may have been the liability of the fund to federal taxation while it remained in the hands of the government, *it cannot properly be said that the share of it paid as royalties to the petitioner constituted in his hands an instrumentality of the government and was therefore beyond the scope of the tax.* (Compare McCurdy v. United States, 246 U. S. 263). There is, therefore, nothing in the nature of the income which excepts it from the effect of sec. 213(a) of the Revenue Act of 1918." (Italics ours).

Applying the above statement of the Court to the facts in the case at hand, the money received by petitioner as his share of the royalties, does not constitute in his hands an instrumentality of the Federal govern-

ment; and the State of Oklahoma had the undoubted right to assess an income tax against the same.

Petitioner relies on the cases of:

Gillespie v. *Oklahoma,* 257 U. S. 501, 66 L. ed. 338;

Shaw v. *Gibson-Zahnizer Oil Corp.,* 276 U. S. 575, 72 L. ed. 709;

Jaybird Mining Co. v. *Wier,* 271 U. S. 609, 70 L. ed. 1112,

and kindred cases, to sustain his contention that the tax in question is a tax upon a governmental instrumentality. In all of these cases there was an attempt by the State to tax mineral lessees of restricted Indian land either by a direct tax on the lease itself or a tax on the income derived therefrom. This Court held that such tax tended to interfere with the policy of the Government in fulfilling its duty to restricted Indians and was, therefore, a tax on a federal instrumentality, and that the State had no right to levy such tax. The reasoning of these cases does not apply to the case at bar. The fund here sought to be taxed is unrestricted and the levying of the tax therefore in no wise interferes with the policy of the Federal government in fulfilling its duty to the Indians or Indian tribe. As before stated, petitioner was not paid his proportionate share of this trust fund as a ward of the government, and a tax levied thereon by the State in no manner tends to interfere with the policy of the Government in relation thereto. It, therefore, cannot be said to be a tax on a federal instrumentality. We think the case of *McCurdy, County Treasurer of Osage County* v. *United States,* 246 U. S. 263, is in point in this case. It is there said:

"The Acts of June 28, 1906, c. 3572, 34 Stat. 539,

> and April 18, 1912, c. 83, 37 Stat. 86, respecting the Osage Indians, do not authorize the Secretary of the Interior to impose restrictions upon private land purchased for a non-competent Osage allottee with his trust money, previously released under Sec. 5 of the latter act, and thus exempt it as a governmental instrumentality, during such restraint from the power of the State of Oklahoma to tax it and to sell it for the collection of such taxes. United States v. Rickert, 188 U. S. 432, distinguished."

In the case of *Fox Film Corp.* v. *Doyal, et al.*, 286 U. S. 123, this Court held that a tax on income derived from copyrights was not immune from State taxation on the ground that the same constituted a tax on a federal instrumentality. In discussing the question, the Court said:

> "The principle of immunity from state taxation of instrumentalities of the Federal Government, and of the corresponding immunity of state instrumentalities from Federal taxation—essential to the maintenance of our dual system—has its inherent limitations. It is aimed at the protection of the operations of government (McCulloch v. Maryland, 4 Wheat. 316, 436), and the immunity does not extend 'to anything lying outside or beyond governmental functions and their exertions.' Indian Motorcycle Co. v. United States, 283 U. S. 570, 576, 579. Where the immunity exists, it is absolute, resting upon an 'entire absence of power' (Johnson v. Maryland, 254 U. S. 51, 55, 56), but it does not exist 'where no direct burden is laid upon the governmental instrumentality, and there is only a remote, if any influence upon the exercise of the functions of government.' Willcuts v. Bunn, 282 U. S. 216, 225."

What is there said applies to the tax in the instant case and since the tax levied does not constitute a direct

burden upon any governmental instrumentality, it was within the power of the State to levy the tax. Petitioner also relies on the holdings announced in the case of:

Choate v. *Trapp*, 224 U. S. 665, 56 L. ed. 941,
and
Carpenter v. *Shaw*, 280 U. S. 363.

In these cases the State sought to tax the unrestricted lands of Choctaw and Chickasaw Indians under the Act of Congress of May 27, 1908 removing restrictions and authorizing taxation of the land. The court held the land not subject to taxation because of the tax-free provision of the Atoka agreement under which the land was allotted. This agreement provided that the land when allotted to these Indians in severalty should remain free from taxation for a period of twenty-one years or during the life of the allottee, or so long as the title of the land remained in the original allottee. The Supreme Court held that this provision of the agreement amounted to a property right, a vested right, and could not therefore be abrogated by Congress; that the subsequent Act of Congress authorizing the taxation of this land within the twenty-one year period destroyed a vested right of the allottee, and that the Act was for this reason unconstitutional and void. The holding in these cases has no bearing on the facts herein involved. There was no treaty entered into between the Government and the Osage tribe of Indians that the land allotted to the members of such tribe should be free from taxation for any period of time. It is true certain restrictions were by Congress placed upon the sale of the land, the mineral rights and the funds derived from the sale thereof but Congress had the power to remove these restrictions or any of them. In

the case of *Choate* v. *Trapp, supra,* the Supreme Court said:

> "The removal of restrictions on alienation of Indian allotments falls within the power of Congress to regulate Indian affairs but the provision of non-taxation is a property right and not subject to action by Congress."

It is our contention that Congress under the Acts of June 28, 1906 and March 3, 1921, removed all restrictions of petitioner as to the funds herein involved, and that such funds by reason thereof became subject to State taxation.

Petitioner also calls attention to the fact that under specific Acts of Congress no member of the Osage tribe of Indian blood can sell or dispose of his headright even though he has received a certificate of competency, and that such headright is not subject to taxation by the State even as against one holding such certificate. He then asserts that since the headright itself is immune from State taxation the income derived therefrom is likewise immune. In our opinion, a complete answer to this contention is: That Congress had the power to remove restrictions from the income derived from the headright without removing the same as to the sale of the headright itself. This under the holding of this Court in the case of *Chouteau* v. *Burnet, supra,* Congress did, and the income involved is, therefore, subject to the tax.

It is true that the trust funds belonging to the members of the tribe who have received a certificate of competency are collected, handled and distributed to such Indians as well as the funds belonging to the non-competents. This is true because they are tenants in common or joint owners of the funds, which funds are col-

lected and handled as to both competents and non-competents by the Federal government in their entirety. There is no practical method of collecting, handling and distributing these funds separately to competents and non-competents. There is no method or means provided by which such funds can be held separately, but the mere fact that the funds are so handled does not render the State tax on the income derived therefrom by one who has received a certificate of competency a tax upon a Federal instrumentality.

Petitioner has been completely emancipated as to the fund involved, and it is, therefore, subject to the State tax.

Judgment of the Supreme Court of Oklahoma should be affirmed.

Respectfully submitted,

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